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**JURISDICTION**

The District Court was convoked under the Urgent Deficiencies Act (ch. 32, 38 Stat. 219, 220). The final decree was entered January 15, 1925 (Tr. 39). The appeal was allowed February 18, 1925, which was less than the sixty days provided by the Act.

**QUESTION**

Was the District Court for the Western District of Texas without jurisdiction to entertain the petition and was the order sustaining the special plea which challenged the venue and jurisdiction correct?

Under the averments of the bill of complaint (Tr. 3) the order of the Commission was entered on the applications of the Southern Pacific and El Paso & Southwestern companies, neither of which has its residence in the Western District of Texas (Tr. 2, 14, 34).

Urgent Deficiencies Act, approved October 22, 1913, provides (38 Stat. 219-220):

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so

complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

#### STATEMENT

Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of Kentucky and operates railroads in Oregon, California, Nevada, Utah, Arizona, and New Mexico (Tr. 2). El Paso & Southwestern Railroad Company is a corporation incorporated under the laws of Arizona and operates railroads in Arizona, New Mexico and Texas (Tr. 2).

On July 1, 1924, Southern Pacific and El Paso & Southwestern, by their joint application under paragraph 2 of Section 5 \* of the Act, applied for an order approving and authorizing the acquisition by the Southern Pacific of the control of the El Paso & Southwestern System, by stock ownership through purchase of the interest therein of the El Paso &

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\* (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises (41 Stat. 481).

Southwestern, and by lease (Tr. 24). Under the provisions of Section 20a, the Southern Pacific applied for authority to issue \$28,000,000 of common capital stock and \$29,400,000 of bonds. By a separate application on the same date the Arizona Eastern Railroad Company requested a certificate that the present and future public convenience and necessity required the construction by it of a line of 115 miles of railroad, all in the State of Arizona, the lines to be constructed as extensions of existing lines of the Arizona Railroad and to connect with the Southern Pacific. Protests were filed but none of the protestants were represented at the hearing. Intervening petitions in support of the applications were also filed and appearances entered on behalf of the Arizona Corporation Commission, the State Corporation Commission of New Mexico, and a number of cities, towns, and commercial organizations of communities served by the applicants and representations in favor of granting the authority sought were made on behalf of the Governor of Arizona (Tr. 25).

By its order dated September 30, 1924, effective in 30 days, entered after a full hearing, the Commission granted the application (Tr. 30).

George H. Park and James F. Kilcrease allege that they are resident-citizens and taxpayers of El Paso and compose the partnership of Home Furniture Company. They bring the suit individually and as partners (Tr. 1). They deal in new and secondhand furniture with "their principal place of business at El Paso" (Tr. 1). They ship furniture over the lines of South-

ern Pacific Railway and El Paso & Southwestern Railway "and are engaged in shipping goods, wares, and merchandise in interstate commerce" (Tr. 2).

Appellants' allege that the Southern Pacific lines run from points in Texas to and through El Paso, in a generally easterly and westerly direction, to Los Angeles (Tr. 5). The two systems parallel across El Paso and between it and Tucson, Arizona, and the common points west of El Paso. The two systems have been and are competitive for passenger and freight traffic of a transcontinental as well as a local nature. The two lines serve both southern New Mexico and southern Arizona, as well as the rapidly growing city of El Paso, a jobbing and shipping center, of developing proportions, now having a population of more than 80,000 people (Tr. 6). Because of the competition existing between the two systems the rivalry has been and is keen, and, as a consequence, the public has had better service for both passenger and freight traffic. As a result of the competition, and as an outgrowth thereof, both lines have been active in solicitation of business for and through the sections traversed by their lines, and at all points between and including Chicago and Los Angeles, and at such intermediate places as El Paso, Texas, Tucson, Arizona, Deming and Lordsburg, New Mexico. In order to secure and hold the business, both lines of railroad have endeavored to give the maximum service, have advertised extensively, and aided in upbuilding and promoting the principal communities on their lines, including the

city of El Paso. The competition has worked a gradual improvement in the treatment by both lines of the public and their practice, rules, and regulations in regard to their methods of doing business, and has facilitated the prompt handling of claims for shippers. The Southwestern System originates a rich traffic for which both the Rock Island Railroad and the Southern Pacific compete eastbound. It is that section which is parallel to the Southern Pacific as far as Tucson which originates a great deal of lucrative business. The El Paso & Southwestern System was built for the purpose of bringing about competition in rates and service with the Southern Pacific System, and appellants are informed and believe that as a resultant reduction in the rates through the construction of the El Paso & Southwestern Railroad the line of railroad was practically paid for within five years after its construction through savings in freight charges. The application of the Southern Pacific to the Commission had, for its primary purpose, the absorption by the Southern Pacific of the Southwestern System in order that conditions may be restored as nearly as may be before the construction of the Southwestern System and for the purpose of suppressing the competition and rivalry that existed between the two systems, as aforesaid, to the end that the Southern Pacific may obtain a complete monopoly of the freight and passenger business to and through southern New Mexico and southern Arizona, and for the purpose of depriving shippers and others of the

privilege of shipping and traveling over one of two competing lines of railroad at their option (Tr. 6).

Appellants further allege that the Southwestern has maintained, and now maintains, its general offices and shops at El Paso where it employs several hundred men and women who live in and about El Paso, who support themselves and their families, who add substantially to the population of the city, and who put in circulation many thousands of dollars, all of which adds to the material happiness and prosperity of the community, increases the value of real and personal property, and consequently assists business enterprises within the city. The Southern Pacific likewise maintains shops at El Paso but its general offices are at San Francisco. If the two systems are fused into one, it is the purpose of the Southern Pacific to consolidate the two shops and either to let many men out of employment or to remove them to other places, to the detriment of the community as well as to those living in El Paso and having business enterprises therein, including the appellants (Tr. 7).

Appellants further allege that they will be greatly injured by the loss of customers who will be deprived of their positions, or because they are moved to other points; that if the consolidation, merger and fusion of the two systems takes place, the appellants will be greatly damaged and injured in their business and property by the loss to the general prosperity of the community of which they are a part, due to

the letting of men out of employment and the removal of others with their families to distant places, and the reduction in population that will necessarily ensue, and because of the decrease in the amount of expenditures in the community, which expenditures have heretofore contributed either directly or indirectly to the success of appellants' business (Tr. 7).

Appellants further allege that for several years they have had and now have the option and right of routing their furniture purchased and sold, by way of either system, and particularly with reference to shipments of furniture going from El Paso to southern New Mexico and southern Arizona, a privilege and right of substantial and pecuniary value to appellants, and if the merger is permitted to take place appellants will be deprived of this privilege, right, and option and will be compelled to ship over the Southern Pacific System alone to their damage and injury (Tr. 7). Because of the competition and rivalry existing between the two systems appellants have, along with the general public, had better service from the two railroads and better treatment, and will continue to have if the merger is not consummated. If the consolidation and merger is permitted, appellants and their business will be greatly injured and damaged by the depreciation in service and the increase in rates, and the laxity in handling of claims and traffic that is the natural result of the suppression of competition and the growth of monopoly. If the merger is consummated, because of the consequent decrease



in the population of El Paso and the cutting down of the amount of money heretofore placed in circulation, property, both real and personal, belonging to appellants, including the business owned by appellants in El Paso, will be depreciated in value and cause appellants great financial and pecuniary loss (Tr. 8).

#### ARGUMENT

**THAT THE ORDER RELATES TO TRANSPORTATION IS SHOWN BOTH BY THE FACE OF THE ORDER AND BY THE AVERMENTS OF THE BILL**

In its report, which is a part of the order (Tr. 30), the Commission found (Tr. 27):

The lines of the Southwestern System are intermediate between the lines of the Southern Pacific, and the lines of the Chicago, Rock Island & Pacific Railway System, hereinafter called the Rock Island. The lines of the three systems constitute one of the principal direct routes between southern California and the Missouri River and Chicago, and are included in the Southern Pacific-Rock Island System in the grouping of railroads under the tentative plan for consolidation of railroad properties promulgated by us under date of August 3, 1921. Consolidation of Railroad Properties, 63 I. C. C. 455. Acquisition of control of the Southwestern System by the Southern Pacific is in harmony with this plan. It will result in direct physical connection between the lines of the Southern Pacific and the Rock Island, will assure the continuance of this route, and will increase its competitive strength as compared with the routes of the

Sante Fe and Union Pacific. While the lines of the Southern Pacific and Southwestern System west of El Paso may be said to be parallel they serve different communities and industrial sections. The points at which the two systems meet are important points of interchange of a large traffic to and from communities served by one but not the other. Better coordination and more efficient and economical operation will follow as to this traffic and as to transcontinental traffic in connection with the Rock Island, and relations to the traveling and shipping public and to public authorities will be simplified and improved.

Another part of the order which relates specifically to transportation is as follows:

*It is ordered*, That the Arizona Eastern Railroad Company, or its lessee, when filing schedules establishing rates and fares to and from points on said new lines of railroad, shall in such schedules make specific reference to this certificate by title, date, and docket number (Tr. 31).

Notwithstanding that part of the order in specific terms relates to transportation, and notwithstanding the averments of the bill, the appellants assigned as the first error that the Court erred in holding the order of the Commission referred to in the decree related to transportation (Tr. 40). Appellants now argue that the order does not relate to transportation. Appellants should be held to the case they undertook to make by their bill, and not to the case which they now seek to make by their brief.

The suit is brought to enjoin, set aside, annul, and suspend the order of the Commission (Tr. 3) which the appellants aver affects them, in that it disturbs the transportation rules and regulations to which they were accustomed. That is their sole and only interest. The District Court sustained that view and dismissed the bill for want of jurisdiction (Tr. 39). That the order was entered on the applications of these carriers is not, and can not be, denied. The machinery of the Commission was set in motion by no other means whatsoever. The Interstate Commerce Act defines transportation.

Section 400 of the Transportation Act of 1920, paragraph (3), which amended paragraph 1 of the Interstate Act (ch. 91, 41 Stat. 475), provides:

\* \* \* The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported \* \* \*.

Section 402 of the Transportation Act of 1920, paragraph (10), which amended paragraph 1 of the Interstate Commerce Act (ch. 91, 41 Stat. 476), provides:

(10) The term "car service" in this Act shall include the use, control, supply, movement distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the

transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

Opposing counsel cite definitions of *transportation* from dictionaries and court opinions, all to the effect that transportation consists of "carriage from one place to another." Those definitions are not disputed, but in connection therewith the definition of *transportation* as laid down by the Interstate Commerce Act should also be considered in any case arising under that Act. The allegations of the bill would appear to bring the order within all of these definitions.

*Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 563, is controlling here. In that case this Court, speaking through Mr. Justice Brandeis, said:

*Second.* The defendants contended also that if the subject matter was within the jurisdiction of a District Court of the United States it was not within that of Oregon. The objection is based upon the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, which declares: "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made." And it is asserted that the parties upon whose petition the order was made are the Merchants' Association of Spokane, a resident of the Eastern District of Washington, and the Railroad Commission of Nevada, a resident

of the District of Nevada. The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original applications of carriers for relief under the fourth section. The report and the order are entitled "In the Matter of Reopening Fourth Section Applications." One of the carriers which had made such application for relief from the provisions of the fourth section was a resident of Oregon, namely, the Oregon-Washington Railroad and Navigation Company; and as it was joined as defendant in the suit, the District Court for Oregon has jurisdiction over the parties.

It is not claimed that any of the companies who were parties to the applications before the Commission were residents of the Western District of Texas.

The bill of complaint contains allegations respecting the power and authority of the Southern Pacific Company under the constitution and laws of the State of Kentucky (Tr. 10, 14). If charter power is to be considered, the United States District Court for the District of Kentucky would seem to be quite as capable of determining the power and authority of the Southern Pacific to do what it did under and by virtue of the laws of that State, as the United States District Court for the Western District of Texas. The same may be said of El Paso & Southwestern which was incorporated under the laws of Arizona.

Appellants were aware that it was necessary for them to allege that the order subjected them to some legal injury, actual or threatened. The injury which they undertook to allege was a transportation injury. They alleged that, as they could allege no other injury whatever. It would not seriously be claimed that the alleged depletion of El Paso's population of 80,000 brought about by the removal of a railroad shop was an interest which would justify a court of equity in enjoining an order of the Interstate Commerce Commission at the instance of a furniture dealer who fears he might lose customers. Opposing counsel were aware of the case of *Hines v. United States*, 263 U. S. 143, 148, in which the decision was announced on November 12, 1923. In that case it was held that the plaintiffs "must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do."

In the instant case, in order to gain any standing whatever in the court, appellants assailed the order and alleged its effect upon the appellants and their business, because of the change in transportation conditions and in the use of the transportation facilities. They are thus pinioned between the proposition, on the one side, that they must allege a legal injury, and the proposition, on the other side, that the order in substance and effect relates to transportation and affects them injuriously. The latter defeats the jurisdiction. The order, by its terms, also relates to transportation.

The State of Texas and its Railroad Commission, by the Attorney General of Texas, appeared before the Interstate Commerce Commission (Tr. 4, 22, 23). But they did not come into this case. Nor did a single one of the numerous municipalities, chambers of commerce, traffic and trade associations, and other organizations who appeared before the Commission (Tr. 22, 23). The City of El Paso and the El Paso Freight Bureau filed an intervening petition before the Commission protesting against acquisition by the Southern Pacific of control of the Southwestern System. That petition was subsequently withdrawn (Tr. 25). With the exception of these two taxpayers, the whole World appears to be satisfied. They did not appear before the Commission, but their present counsel did as "*amici curiae*, protestants" (Tr. 4, 24).

#### CONCLUSION

The decree should be affirmed.

WILLIAM D. MITCHELL,  
*Solicitor General.*

BLACKBURN ESTERLINE,  
*Assistant to the Solicitor General.*

P. J. FARRELL,  
*Solicitor for Interstate Commerce Commission.*

